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# Supreme Court of the United States.

OCTOBER TERM, 1969.

No. [redacted] 309

DONALD P. TULLOCH,
*Petitioner,*
*v.*
JOHN VON UTTER, JR.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF OF RESPONDENT IN OPPOSITION.

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# Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 1741.

DONALD P. TULLOCH,
*Petitioner,*

*v.*

JOHN VON UTTER, JR.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF OF RESPONDENT IN OPPOSITION.

### Questions Presented.

I. The District Court did not misuse its discretionary powers by ordering respondent's release.

II. The court below rightly held that the petitioner, in the circumstances of this case, is precluded from requesting a remand to the state court for an independent judicial determination as to the validity of the arrest and subsequent search.

## Statement of the Case.

The petition for writ of certiorari claims first (Point I) that this Court should utilize this case to consider the broad problems of increased usage of habeas corpus and the problems of crowded court dockets, thereby shifting the orientation of petitioner's appeal from the issue as decided by the court below. Petitioner here seeks an advisory opinion, asking the Court to establish procedural guidelines, the arguable necessity for which are irrelevant for the determination of the issue as decided by the court below.

Petitioner further claims (Point II) that the court below erred in holding petitioner precluded from requesting a rehearing in the state court on petitioner's alternative theory even though all the elements of the arrest and search were either known by petitioner or easily ascertainable by him at the commencement of the state court proceedings.

## Facts.

Respondent adopts petitioner's statement of the facts (commencing on page 2 of the petition) subject to the following modifications and comments which respondent feels necessary for clarification of the issues presented.

Petitioner at page 5 of his statement claims that he became aware of the circumstances surrounding Von Utter's arrest and the subsequent search of his auto while preparing his return to the petition for a writ of habeas corpus in the District Court. Even assuming this to be valid, it is highly unlikely that this information was unavailable to petitioner following the arrest of respondent but prior to the initial hearing held in the state court.

Petitioner argued his alternative theory—that of a valid warrantless search as incident to a valid arrest—for the first time in the District Court. This fact is postulated in a stipulation by the parties submitted to the District Court ("R" 28-29).[1] The District Court found the warrant to be invalid not only on the basis of *Spinelli* v. *United States,* 393 U.S. 410, but on principles long ago solidified into search and seizure law emanating from *Aguilar* v. *Texas,* 378 U.S. 108.

Petitioner states on page 6 of his petition that the court below did not decide whether *Giordenello* v. *United States,* 357 U.S. 480, foreclosed petitioner from requesting a renewed probable cause hearing in the state court. Petitioner misapprehends the continuity of the opinions below (App. A and B). The District Court, after holding the search warrant to be invalid, dealt with petitioner's alternative theory on the merits. *For the sake of argument* it assumed the warrantless arrest to have been proper, then held that the subsequent search of Von Utter's automobile would, nonetheless, still fall outside the perimeter announced by this Court in *Chimel* v. *California,* 395 U.S. 752. Moreover, to further answer petitioner's belated alternative contentions, the District Court held that *Giordenello* v. *United States,* 357 U.S. 480, restricted petitioner from raising, for the first time in the District Court, a theory the premises of which were either known or could have been known and advanced at the time of the state court hearing.

The court below also held the search warrant, with its attendant affidavit and memorandum, invalid.[2] Because

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[1] References are to the Appendix filed by petitioner in the court below ("R"), and to the Appendix to the present petition ("App.").

[2] Precedent within the First Circuit was based on *Saville* v. *O'Brien,* U.S.C.A. 1st Cir. (Dec. 1969). See App. A at 17.

of its invalidity, Officer Meads approached Von Utter with suspicion only. Like the accused Mr. Toy in *Wong Sun* v. *United States*, 371 U.S. 471, respondent's flight was provoked by the wrongful conduct of the officer and could only be seen as an ambiguous act. The court below did not deal with petitioner's belated contention because it felt the argument decided itself on the basis of constitutional fact. Unlike the District Court it did not engage in ancillary speculation for the sake of argument.

## Reply to Petitioner's Argument.

I. Petitioner seeks to attack the decisions of the courts below on the merits by orientating his emphasis here to the fact that the proceedings below were brought under the provisions of 28 U.S.C. 2241 *et seq.* Thus petitioner argues that the courts below, in essence, did not remand this case for a renewed probable cause hearing in the state court because in administering the Federal Habeas Corpus Act the federal courts lack proper guidelines (Petitioner's Brief, at 6). Moreover, petitioner maintains by implication that these guidelines would or should include the concept that habeas corpus exists to attack illegal detention—thus, when detained, it is incumbent upon the habeas corpus applicant to prove not only that the reasons advanced by the state for his detention are invalid, but that any and all reasons which could possibly, at any time, be advanced by the state for his detention are also invalid (Petitioner's Brief, at 8). Clearly, the obvious inaccuracy of petitioner's conclusion is apparent.

There is little doubt that the writ of habeas corpus lies solely to attack illegal detention. From the inception of its incorporation into the corpus of our law its function has been the same. As Chief Justice Marshall said in *Ex parte Watkins*, 28 U.S. 370, 3 Peters 193, 202 (1830);

> "The writ of *habeas corpus* is a high prerogative writ known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause."

Since the sole function of the writ of habeas corpus is to force a determination of the constitutional legality of the restraint on an individual's liberty the District Court judge is given wide discretionary powers. *Townsend* v. *Sain*, 372 U.S. 293, 318 (1963).

The petitioner, in his argument opposing the petition for the issuance of the writ, raised for the first time the alternative theory that petitioner's search was lawful being incident to a valid arrest (App. 28-29). This, petitioner maintained, entitled him to a new evidentiary hearing to supplement the record since, by foregoing this theory earlier, the state had not produced sufficient facts on the issue. The District Court held it doubtful that the search and seizure could *or should* be justified on the state's alternative theory when presented for the first time in the District Court. The court held the state should not be allowed to violate its own volitional course, *Giordenello* v. *United States*, 357 U.S. 480 (1958), and even assuming, for the sake of argument, a lawful warrantless arrest, the subsequent search of petitioner's automobile was too far ranging. *Chimel* v. *California*, 395 U.S. 752 (1969).

In *Giordenello* v. *United States*, 357 U.S. 480, 489, 78 S. Ct. 1245, 1251 (1958), the contention advanced by the government was that, since Texas law permits a warrantless arrest if based on probable cause, notwithstanding the legal insufficiency of the warrant, the federal officers in the case, acting under authority of state law, were justified in making the arrest and conducting the subsequent search and seizure. The Court rejected this argument.

"We do not think that these belated contentions are open to the Government in this Court and accordingly we have no occasion to consider their soundness. To permit the Government to inject its new theory into the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond. This is so because in the District Court petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no reason to cross-examine Finley or to adduce evidence of his own to rebut the contentions that the Government makes here for the first time.

"Nor do we think that it would be sound judicial administration to send the case back to the District Court for a special hearing on the issue of probable cause which would determine whether the verdict of guilty and the judgment already entered should be allowed to stand. The facts on which the Government now relies to uphold the arrest were fully known to it at the time of trial, and there are no special circumstances suggesting such an exceptional course. Cf. *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233 [78 S. Ct. 245, 2 L. Ed. 2d 234]" (357 U.S. at 488, 78 S. Ct. 1245, 1251 (1958)).

Petitioner misconstrues the true meaning of *Giordenello*. The burden of *Giordenello* is not on the judiciary, it is on law enforcement. To have asked respondent at the stage of the proceedings in the courts below to rebut a wholly new contention is violative of due process. There was ample time and opportunity in prior proceedings for petitioner to inject whatever other theory he desired to justify the invasion of respondent's fundamental liberties.

Petitioner contends that *Giordenello* has been eroded. Petitioner cites *Jackson* v. *Denno*, 378 U.S. 368; *Rogers* v.

*Richmond*, 365 U.S. 534; *Boles* v. *Stevenson*, 379 U.S. 43; *Ellis* v. *Fitzharris*, 407 F. 2d 789 (C.A. 9); and *Lee* v. *Alabama*, 386 F. 2d 97 (C.A. 5). Interestingly, all of these cases deal with the standards to be applied in determining the voluntariness of confessions. In *Lee* the Alabama statute involved, Code Alabama, 1940, Tit. 15, § 428, required an independent pretrial judicial determination of the accused's competency to stand trial. In *Ellis* the record was insufficient to determine or review whether the trial judge made an independent determination concerning the voluntariness of a confession and in *Boles* there was doubt as to what the trial judge thought about the voluntariness issue. *Jackson* and *Rogers* are pivotal in that they evolved the standard used to determine the voluntariness of confessions at pretrial hearings.

*Giordenello* did not concern a confession. Moreover, in the present case, unlike those outlined above and relied upon by petitioner, the issue of a valid search was one of constitutional fact fully capable of complete review by the federal courts below. Unlike the above cases there was no doubt as to how the state court had handled the issue which dealt with respondent's constitutional rights. Since respondent had been convicted on the basis of the state court's unambiguous decision of the issues presented to it, his detention was declared illegal on further scrutiny of those issues in the courts below. In cases dealing directly with the issue at hand, to wit, habeas corpus proceedings and the suppression of evidence, there is no indication that *Giordenello* has fallen into disrepute. *Jack* v. *United States*, 387 F. 2d 471 (1967); *Acosta* v. *Beto*, 297 F. Supp. 89, 95 (1969).

The basic issue in appellant's belated contention is this: would respondent have been approached if the officers had not procured a search warrant? It seems obvious he would not have. Even assuming the facts as petitioner contends,

the Supreme Court has held that searches incident to a lawful arrest—on facts much more probative to probable cause than in the instant case—would not justify a subsequent search. *Sibron* v. *New York*, 392 U.S. 40 (1968). In *Sibron* the police officer observed the defendant speaking with known narcotics users for over eight hours. Like the officer in *Sibron*, Sergeant Meads had no personal knowledge about the defendant. He also had not corroborated the information nor the reliability of his informer. Thus it is our contention that no probable cause existed for the search of respondent's automobile and none existed for his arrest until *after* the officers unlawfully restrained him and entered his automobile. *Brown* v. *Patterson*, 275 F. Supp. 629 (D. C. D. Col. 1967).[3]

The United States District Court was not hindered because federal claims had been decided adversely to the respondent by the courts of Massachusetts. *Fay* v. *Noia*, 372 U.S. 391, 425 (1963). Moreover, if the repondent had raised an issue for the first time in the United States District Court the court would have been entirely justified in dismissing the petition for failure to exhaust state remedies, 28 U.S.C. § 2254. Should the state's obligations be less burdensome? The District Court, in its discretion, decided that it should not. The rationale of the exclusionary rule of the Fourth Amendment is directly applicable.

II. The petitioner maintains that the court below misapplied the "taint" or "fruit of the poisonous tree" doctrine because no primary illegality by law enforcement officials occurred. Petitioner argues that the initial con-

[3] In *Chambers* v. *Moroney*, 38 L. W. 4547 (June 22, 1970), unlike the instant case, probable cause for arrest and search existed at the time of confrontation.

frontation between officers of the law and respondent "did not amount to an illegal arrest" (Petitioner's Brief, at 12).

In those cases relied on and distinguished by the court below, probable cause to search existed with or without a warrant.[4] *United States* v. *White,* 342 F. 2d 379, 381 (4th Cir.), cert. den. 382 U.S. 871 (1965); *Williams* v. *United States,* 273 F. 2d 781, 790 (9th Cir.), cert. den. 362 U.S. 951 (1960). In the present case, however, as in *Wong Sun* v. *United States,* 371 U.S. 471, respondent, like the defendant Mr. Toy, was approached on the basis of the most insubstantial suspicion. Like Mr. Toy, respondent then fled. In *Wong Sun* the Court stated:

> "The Government contends, however, that any defects in the information which somehow took the officers to petitioner Toy's laundry were remedied by events which occurred after they arrived. Specifically, it is urged that Toy's flight down the hall when the supposed customer at the door revealed that he was a narcotics agent adequately corroborates the suspicion generated by Hom Way's accusation. Our holding in *Miller* v. *United States,* 357 U.S. 301 [78 S. Ct. 1190, 2 L. Ed. 2d 1332], is relevant here, and exposes the fallacy of this contention. We noted in that case that the lawfulness of an officer's entry to arrest without a warrant 'must be tested by criteria identical with those embodied in 18 U.S.C. § 3109 [18 U.S.C.A. § 3109], which deals with entry to execute a search warrant.' 357 U. S., at 306 [78 S. Ct. at 1194]. That statute requires that an officer must state his authority and his purpose at the threshold, and be refused admittance, before he may break open the door. We held that when an officer insufficiently or unclearly identifies his office or his mission, the occupant's flight

[4] App. A at 20.

from the door must be regarded as ambiguous conduct. We expressly reserved the question 'whether the unqualified requirements of the rule admit of an exception justifying noncompliance in exigent circumstances.' 357 U. S., at 309 [78 S. Ct. at 1196]. In the instant case, Toy's flight from the door afforded no surer an inference of guilty knowledge than did the suspect's conduct in the *Miller* case [371 U.S. 471, at 482].

. . . . . .

"A contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked. Cf. *Henry* v. *United States,* 361 U. S. 98, 104 [80 S. Ct. 168, 172, 4 L. Ed. 2d 134]. That result would have the same essential vice as a proposition we have consistently rejected—that a search unlawful at its inception may be validated by what it turns up." (371 U.S. 471, at 484.)

The doctrine of "taint" relies on two operative premises: that of the primary illegality of law enforcement officers with the causal nexus of this behavior to the evidence sought to be suppressed.[5] Petitioner seems to be suggesting an unduly hyper-technical interpretation of the word "illegality." In *Silverthorne Lumber Co., Inc.* v. *United States,* 251 U.S. 385, 392 (1920), Mr. Justice Holmes used the word "wrong." A literal interpretation of the word illegal does nothing to elucidate the concept. Mr. Justice Holmes in *Silverthorne,* stated:

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[5] *Silverthorne Lumber Co., Inc.* v. *United States,* 251 U.S. 385, 392 (1920).

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 251 U.S. 385, at 392.

When respondent Von Utter was confronted by police officers and told his car was to be searched there was neither probable cause to arrest him nor to search his vehicle. Respondent sees no substantial difference if this provocation be called an illegality, a wrong, an error—it still remains a transgression which resulted in the infringement of respondent's fundamental liberties secured against abridgment by the Fourth Amendment.

## Conclusion.

In neither federal court below was the issue of the proper administration of the Federal Habeas Corpus Act a fulcrum of either argument or decision. Both courts dealt with two issues: the validity or invalidity of a search warrant and the request of petitioner for a renewed hearing in the state court based upon his belated contention seeking to validate the search as an incident to a valid arrest. Petitioner no longer argues in this Court the decided invalidity of the search warrant, yet still seeks to advance his alternative theory to justify the search. Respondent successfully proved below that the reason advanced in the state courts by the government for his detention was violative of respondent's constitutional rights. To allow a remand to the state court, in this case, would condone the activity of justifying a search in retrospect on the basis of facts not advanced in the state courts but clearly either

known or available to be known by the petitioner at that time. It is respectfully maintained by respondent that this contention falls within the ambit of the exclusionary rule and the public policy it evidences. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

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